

WOULD GIVE PARK NO MONEY

WILL TEST POWERS OF SUPERVISORS.

BY E. A. DOUTHITT.

"Although it is my opinion that the Board of Supervisors has no legal authority to make appropriations for Kapiolani Park, or in aid of the schools, still these subjects being of such moment to the public, I think it advisable, and have so advised the Board of Supervisors, that they should get the decision of the Supreme Court upon this question, notwithstanding any opinion that I might hold, in order that the powers of the Supervisors may be definitely settled. With this end in view, it is my purpose to take such steps in a day or so as will directly bring the matter to the attention of the Supreme Court for a speedy determination."

created is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

Mr. Dillon further quotes with approval the forcible language of the learned late Chief Justice Shaw, who, speaking of municipal corporations, says:

"They can exercise no powers but those which are conferred upon them by the act by which they are created, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is observed from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted."

It is a well settled principle of construction of grants by a legislative body to municipal corporations, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved against the corporation and in favor of the public. In support of this doctrine, I cite the case of *Minton vs. La Rue*, 23 How. 435. This doctrine has been affirmed and reaffirmed by the highest court in the land, in cases arising subsequent to the *Minton* case.

We must take into consideration that the power of the Board of Supervisors with reference to the disposition and appropriation of public funds is a delegated power, and being a delegated power, it becomes necessary to adopt a strict and rigid construction, rather than a loose and pliable one. So, therefore, in endeavoring to ascertain what the powers of the board may be with regard to the appropriation of public moneys, it will be necessary to ascertain what may be the subjects or objects of appropriation. It is specifically set forth in the County Act, as hereinabove quoted, that the Supervisors can only make appropriations for legal claims against the County. Now it must follow, that if, in any given instance, there is no legal claim enforceable against the County, then the Supervisors would be violating their trust if they should make appropriations for purposes which could never be made the basis of a legal claim against the County. It must not only be a legal claim against the County, but it must be enforceable as such. In support of this view, I beg to call the attention of your Honorable Board to the action taken by the Supreme Court of a number of states with reference to this subject. The Supreme Court of the State of California, in the case of *Linden vs. Case*, 46 Cal. 171, decides as follows:

"The Board has no power to audit and allow accounts not legally chargeable to the County."

Richmond Co. vs. Ellis, 59 N. Y. 620 decides as follows:

"The County court can not allow claims against the County which grow out of contracts which the County is not authorized to make."

Engle vs. Clifton, 26 Ark. 454:

"The allowance of a claim by a board of supervisors which is not legally enforceable, imports no acknowledgment to liability of the county thereon."

The following case, which was decided by the Supreme Court of Indiana, is somewhat in point, and it will be instructive to learn what the Supreme Court of that state had to say:

"Where parties voluntarily construct a levy upon private property subsequently dedicated to the public, the power of the board of county commissioners to reimburse them depends wholly upon whether the board could have employed them to do the work at the time it was done, and unless it had power to do so, its allowance of a claim for such services is illegal, however beneficial the work may have been to the public, and any taxpayer feeling aggrieved may have relief by appeal." *Gemmill vs. Arthur*, 125 Ind. 258.

The Supreme Court of Iowa, in the case of *Foster vs. Clinton Co.*, 51 Iowa, 541, has to say upon this subject as follows:

"Unless the law requires or authorizes payment of the claim against the county, the board of supervisors has no power to allow it under Code 1873, section 303, authorizing the board to examine, settle and allow all just claims against the county."

The language used in the case last quoted is almost identical with the language of our County Act with reference to the disposition of public funds. Our Act, relative to the Auditor's duties, provides as follows:

"Shall issue warrants on the County Treasurer in favor of persons entitled thereto in payment of claims and demands chargeable against the county which have been legally examined, allowed and ordered paid by the Board of Supervisors."

It will be readily seen that the provisions of the Iowa statute are almost identical with the language of our County Act, and if the words are not the same, the spirit is.

I could go on indefinitely citing many additional authorities in support

of the principles above announced, but it would be a waste of time to do so. Therefore, the board will readily see that it can make no appropriation of public moneys unless the person for whom benefit it is made had a legal claim, enforceable against the county.

Kapiolani Park is a Territorial institution. It is regulated and governed by a board of trustees appointed by the Governor of the Territory of Hawaii, called the Kapiolani Park commission. There was a special statute of the Territory of Hawaii creating this commission and defining the duties of the commission. The county has no control over Kapiolani Park or over this commission. The county does not employ any of the laborers working therein. The commission or the laborers employed therein are in no way beholden or responsible to the county. If the county should desire to discharge or remove any one of these commissioners or any person employed in the Kapiolani Park, it would be powerless to do so. It is not a county institution, and the County Act has in no wise disturbed the rights and powers of this commission. It is mainly and essentially a Territorial park, as distinguished and differentiated from a county park. It is just as much for the use and benefit of the people of the County of Maui as it is for the use and benefit of the people of the County of Oahu. Then on what theory could it possibly be urged that the Kapiolani Park is for the use and benefit of the whole Territory, why should the County of Oahu be obliged to maintain it? It is true that the geographical area of the park in question is situated within the Territorial confines of the County of Oahu, but such fact does not necessarily change the legal aspect of affairs.

The question may well be asked as to what position the parks other than Kapiolani Park are in. This question is easily answered by referring to the provisions of the Revised Laws with respect to these other parks. These provisions will be found in chapters 60, 61, 62 and 63 of the Revised Laws, and it will be observed that in each of the chapters mentioned the Superintendent of Public Works is vested with the duty of maintaining the same. As to Kapiolani Park, the Superintendent of Public Works has not now, and never has had, any direct supervision over it. This power having been vested in the commissioners by a special act of the Legislature. In seeking to ascertain the exact status of these other parks, it becomes necessary to read a portion of the decision by our learned Supreme Court in the case of *Castle vs. the Secretary of the Territory*, reported in volume 16, Hawaiian Reports, at page 759 thereof:

"Creating counties and providing for their government does not require, and therefore does not imply, the abrogation of the functions in respect to Territorial affairs of the Territorial officers such as the Attorney General and Superintendent of Public Works. As far as officers other than the Attorney General are concerned, we do not consider that the Act unduly encroaches upon their prescribed functions."

This portion of the decision in question was in response to the objection urged by Mr. W. R. Castle with reference to the transfer of the powers of the Superintendent of Public Works to the territory. The Supreme Court held in that case that the transfer of such powers from the Superintendent of Public Works to the Supervisors of the various counties was not an abrogation of the functions of the Superintendent of Public Works, but a modification of the same. So, therefore, with regard to the other parks formerly controlled and managed by the Superintendent of Public Works, it may well be urged that such transfer to the counties would not be an abrogation of the functions of the Territorial officer, but a modification of the same. But such condition does not obtain with regard to the Kapiolani Park, because the Kapiolani Park was never under the control of the Superintendent of Public Works.

Can it be claimed that the Kapiolani Park Commission could force the County of Oahu to make appropriations for the use of Kapiolani Park? If the Board of Supervisors could be forced to appropriate moneys for the maintenance of this institution, then it would be a legal claim "chargeable" against the county; it could be "enforced" by legal proceedings—but I hardly believe that the Board of Supervisors of this county could be legally forced to make appropriations for the purpose named; and therefore it must follow, by logical deduction, that if the Board of Supervisors of this county could not legally be forced to make such appropriation, then the claim would not be enforceable against the county, and if the claim is not enforceable against the county, then the Board of Supervisors could not be forced to audit or allow such claim.

In conclusion, I will state that your Honorable board is vested with certain prescribed powers, beyond which it can not go. Much as your board would desire to make the appropriation in question, still it can only act within the scope of the power vested in it by law. I am, therefore, of the opinion that inasmuch as the claim is not a legal claim against the county and could not be enforced as such, that your board has no power to make

CALLING IN PRISONERS

"Every prisoner that belongs in Oahu prison, that is, every prisoner who has been convicted of a felony in the Territory, will be in the prison on Saturday next," said High Sheriff Henry yesterday.

It appears that, under the old system, it had been the practice to leave the prisoners convicted of minor offenses that were still felonies on the other islands in the custody of local jailors. There was need that the men should work on the roads, and at other public improvements, and they were still in the custody of the High Sheriff, no matter where they were, and escape from the outer island prisons was to all intents and purposes impossible.

The adoption of county government worked no immediate change, although it was bound to bring about a change sooner or later. The county sheriffs were not the deputies of the High Sheriff, as the old island sheriffs had been, and were not in charge of the island jails.

"When county government went into effect," went on High Sheriff Henry, "I asked the then Attorney-General, Lorin Andrews, what I should do about the prisoners on the other islands. He said that they were all in my custody, and I was responsible for their safe keeping, but he advised me to leave them where they were for a little time, as the new counties might be short of money, and their work would probably be needed on the roads."

"I left them, accordingly, but have not felt at any time that matters were as they should be in this regard. I wanted the men in my own charge, as I was responsible for them. Accordingly, I have consulted Attorney-General Peters about the thing, and I find that his opinion coincides with my own—namely, that the prisoners should all be brought to Honolulu and kept on the reef."

"My deputy, McGurn, is now at Hilo, and I have sent George See to Maui and these two have instructions to bring up the Territorial prisoners from those two islands. I shall expect to have the men placed in my hands on Saturday, as I have said. There are fifteen such prisoners in the Hilo jail, and nine in the jail at Waikuku. There is one such prisoner on the island of Kauai, and I have sent orders to have him delivered here likewise."

FALLING TREE CRASHES INTO A COTTAGE

Considerable damage was done about town yesterday by the kona storm. Trees were blown down in many sections of the city and plant life was pretty well disturbed.

A large algaroba tree which stood in the Gedde lot, corner of Hotel and Richards streets, was blown down during the afternoon and crashed into the cottage adjoining the lot. Half of the porch was smashed and carried away and a portion of the house proper was also damaged. The people living in the cottage were almost panic-stricken for the time-being. The tree is an exceptionally large one, and all of it except about thirty feet of the trunk, fell directly upon the house.

A score of algaroba trees along the upper Kapiolani Park road were leveled, and the road was blocked.

Banana trees about town suffered and scores were reported to have been blown down.

An afternoon paper prints a rumor that one of the party of Oregon young women now here is engaged to be married to a Honolulu man.

any appropriation with regard to Kapiolani Park. I beg to remain, respectfully yours,

E. A. DOUTHITT,
County Attorney, County of Oahu.

LUCAS WOULD APPEAL

Lucas, while respecting the opinion, thought that it would not hold water and urged that the matter be taken to the Supreme Court. He said that if the board had been misappropriating money on behalf of Kapiolani Park for several months, the members of the board might be held responsible.

Lucas suggested the employment of outside counsel in order that the matter might be taken to the courts immediately.

Douthitt said that it might be as well to wait for a day or two and get an agreed statement of facts to submit to the Supreme Court.

Archer said that he was with the County Attorney in the matter and thought that after hearing the opinion rendered no more appropriations for Kapiolani Park should be made.

When the County Attorney is ready to outline a course to be taken in the matter, a special meeting of the board will be held and definite action taken.

KAHAULI BIDS

The bids on Kahauli bridge were discussed. It was decided to await the return of County Engineer Gere before taking action on the bids.

HOUSE NUMBERING

It was decided that House Numbering Murphy should be authorized to proceed with his good work until the same be completed.

BAND'S ISLAND TRIP

Archer asked that the band visit the Ewa district on the 11th inst. It will go.

Paele wanted the band for Koolaula and Koolapoko districts on the 23rd and 24th inst. Kapelmeterberger will be authorized to make the trip.

At 10:25 p. m. the meeting adjourned subject to the call of the chair.

SUDDEN DEATH OF CLARENCE WHITE

(From Wednesday's Advertiser.)

Clarence M. White, chief clerk of the Public Works Department, died last evening at his residence, 1417 Makiki street. Mr. White was suddenly stricken about 8 o'clock and immediately became unconscious. At 8:30 he was pronounced dead by Dr. C. B. Cooper, who had been summoned immediately after Mr. White was taken



THE LATE C. M. WHITE.

ill. Death was due to rupture of a cerebral blood vessel.

The news of Mr. White's death spread quickly and was given out in various lodge meetings, the deceased being prominent in secret societies here. Representatives of the various organizations to which Mr. White belonged immediately went to his home and arranged to hold the funeral on Thursday afternoon at 3 o'clock from the Masonic Temple under the auspices of Oceanic Lodge No. 371, F. & A. M. The following pall-bearers have been selected: John Hughes, John Oudekirk, E. I. Spalding, George A. Davies, P. M. Lucas, Ed. Towse, L. de L. Ward and H. T. Moore.

Mr. White has been a sick man for several years and while cashier of the Oahu Railway & Land Co., was compelled to give up his office work and seek health in work which was less confining. Of late he seemed to be in pretty good condition. At all times he was cheerful and was always interested in public affairs.

Clarence M. White was born September 2, 1848 at Maunee City, Ohio. He received a common school education there and afterwards attended and graduated from Phillips Academy in Massachusetts. His ambition was to take a college course was never gratified. He was of a literary turn of mind and became a student of English literature and history, in both of which studies he was quite advanced. This opened up for him a career as a school teacher, and he went west and taught for several years in California. He also held several elective offices. He came to Hawaii in 1879 and taught school in Hilo, Hawaii; Hamoa, Maui, and Kapaa, Kauai. Coming to Honolulu he was a bookkeeper with Macfarlane & Co., and afterwards became chief bookkeeper and cashier for the Oahu Railway Co. He was appointed chief clerk of the Public Works Department by H. E. Cooper, then the Superintendent of Public Works, which position he held at the time of his death.

The deceased was a Past Master of Oceanic Lodge No. 371, F. & A. M., Chancellor Commander of Oahu Lodge No. 1, Knights of Pythias; Worthy Patron of Lele Aloha Chapter, Order of the Eastern Star; and as an 18th degree Mason was a member of Rose Croix Chapter.

He was married on January 16, 1888, to Miss Ettie Spring, sister of the wife of Henry Davis. He leaves besides the widow, five children, the eldest fifteen years of age.

WHITE MAY HAVE NO SUCCESSOR

Politicians began moving men about on the chess board yesterday with a view of filling the vacancy in the office of Chief Clerk of the Public Works left by the death of Clarence M. White. There were a number of names mentioned in connection with the place. J. Morton Riggs is a candidate. Gus Murphy has also been spoken of—and there are several others. However, it is entirely likely that there will be no prize to give out to anybody. Manuel Cooke is the next in succession to the late Mr. White, and there is plenty of clerical help, so it is said, in the Public Works office, in view of the fact that the county has relieved the department of a large share of its work. So it is probable that Cooke will be moved up a peg, and the salary of one clerk will be saved. Mr. White drew \$150 a month.

RHEUMATISM CAN BE CURED.

There is no disease which inflicts more torture than rheumatism and there is probably no disease for which such a varied and useless lot of remedies have been suggested. To say that it can be cured is therefore a bold statement to make but Chamberlain's Pain Balm, which enjoys an extensive sale in this country, has met with success in the treatment of this disease wherever it has been tried. One or two applications of this liniment will relieve the pain and hundreds of sufferers from this disease testify to permanent cures by its use. For sale by all Dealers and Druggists, Benson, Smith & Co., Ltd., Agents for Hawaii.

The chief topic of interest at the meeting of the Board of Supervisors last night was the question as to the right of the Board to appropriate money for Kapiolani Park.

County Attorney Douthitt furnished the Board with a 10-page opinion in which he held that the Board in making such appropriation was acting without authority. He will now proceed to outline a course of action to be taken with a view to submitting the matter to the Supreme Court for adjudication. A special meeting of the Board to deal with the matter will probably be called in a few days.

Present were Chairman Adams, Supervisors Moore, Lucas, Cox, Paele, Archer, George Nawakoa, A. E. Murphy, Clerks Kalauekani and Buntandau, Stenographer Aea, W. L. Frazee, County Attorney Douthitt, W. W. Harris and representatives of the Press.

The minutes of the last meeting were read and approved.

APPROPRIATIONS.

The following appropriations were made:

County office rent, \$100.
Garbage department, \$523.65.
Ewa road district, \$2174.75.
Waianae road district, \$861.50.
Kapiolani Park, \$634.05.
Ewa road district, \$787.15.
Waianae road district, \$14.
Road department, \$3722.84.
Pupukea homestead road, \$528.43.
County Treasurer, \$2.
Keepers of parks, \$24.80.
County Clerk, \$296.30.
Fire department, \$996.47.
County Auditor, \$25.85.
Hawaiian Band, \$159.62.
County Attorney, \$32.25.
Waialua road district, \$619.45.
County Engineer, \$178.73.
Koolapoko road district, \$163.66.
Police department, \$1029.42.
Koolaula road district, No. 2, \$191.10.
Garbage department, \$451.77.
Road department, \$879.27.
Koolaula road district, No. 2, \$321.26.
Electric light department, \$998.37.
Police and fire alarm system, \$47.80.
Koolaula road district, No. 1, \$155.45.
Total, \$23,551.14.

AFTER THE TAXES.

Archer reported progress in his good work of getting heads of departments to see that their employees paid their personal taxes. He suggested that it would be a graceful act and at the same time look well if all the Supervisors would pay their own personal taxes.

Adams murmured heartfelt assent.

THE POLICE RECORD.

The report of police operations for the past month was read and placed on file.

The arrests numbered 404, convictions 265, discharges 139. Fines imposed totaled \$1058.50 and costs \$255.60. Bail amounting to \$245 was forfeited. Fines and costs paid aggregated \$754.70.

Sixty-nine arrests were for drunkenness, 188 for gambling and one for selling spirituous liquor without a license.

FINANCIAL REPORTS.

The County Treasurer's report for February was read and placed on file, as was the auditor's report for the same month.

COUNTY NOT PLUSH.

It transpired that if the county paid all it owed to date, the balance in hand would not amount to over \$6000.

Chairman Adams remarked that they were sailing mighty close to the wind.

NO CREMATORY MONEY.

A communication was read from the Board of Health to the effect that the following motion had been moved and carried at a meeting of the board:

"That no public grounds for the dumping and disposition of garbage be allowed in Honolulu and that the Board of Supervisors of the County of Oahu be recommended to use the garbage crematory."

Lucas' motion amended by Moore, that the Board of Health be notified that the county has no money to appropriate for the maintenance of a crematory, was unanimously passed.

MINOR MATTERS.

Superintendent of Public Works Holloway called the attention of the board to the fact that the inventory of property turned over by the Territory to the County Supervisors and formerly under the control of the various district road boards of this island, have not as yet been received and returned to him.

The matter will be given immediate attention.

Wong Leong complained that the road men had broken up a road in his premises at Kailhi without his permission and requested that the road be put in its original condition. Referred to Road Committee.

A communication from Frank S. Dodge, superintendent of the Bishop estate, relative to fencing a portion of the property and the repairing of certain roads, was referred to the Road Committee.

The Honolulu Iron Works informed the board that the three Kelly-Springfield steam rollers ordered by the county would arrive from San Francisco per the S. S. Nebraskan, due this week.

Fire Chief Thurston reported five alarms of fire during February. The largest loss was on the S. S. Texan.

A. A. Wilson forwarded bills for February against the Pupukea homestead road.

KAPIOLANI PARK.

The following opinion of County Attorney Douthitt as to the powers of the board with reference to appropriations for Kapiolani Park was read:

Honolulu, March 6, 1906.
D. Kalauekani, Esq., County Clerk, County of Oahu, Ex Officio Clerk, Board of Supervisors.

Dear Sir: In response to the request made by Honorable E. R. Adams, Chairman of the Board of Supervisors, for my opinion as to the powers of the board with reference to appropriations for Kapiolani Park, I beg to say as follows:

As heretofore pointed out, the authority of the Board of Supervisors to make appropriations is confined to County purposes, and in order to ascertain what disposition of public funds may legally be made by the

Board of Supervisors, it becomes necessary to carefully read the provisions of the County Act with reference to the disposition of such funds. Subdivision 5, section 9, chapter 4 of the County Act provides as follows:

"No county shall in any manner give or loan its credit to or in aid of any person or corporation and any indebtedness or liability incurred contrary to this provision shall be void."

Subdivision 7 of the same chapter is as follows:

"All contracts, authorizations, allowances, payments and liabilities entered into, granted, made or incurred in violation of this Act, shall be void, and shall never be the basis of a claim against the County."

Subdivision 8 of the same chapter is as follows:

"Each of said counties shall, for the purposes and objects of this Act, be a body corporate and politic, and as such shall have all the powers and authority by this Act prescribed, the same to be vested in and exercised by the Board of Supervisors of the County, as hereinafter provided, etc."

Section 62, chapter 14, defining the powers and duties of the board, provides as follows:

"The Board of Supervisors of each County shall have general supervision and control of all the public affairs of their respective counties, etc."

Subdivision 1 of section 62 reads as follows:

"To fix the salaries of all County officers, not herein otherwise provided."

Subdivision 2, section 62, is as follows:

"To authorize and supervise the expenditure of all funds 'belonging to the County.'"

Subdivision 4 is as follows:

"To enforce all claims on behalf of the County and approve all lawful claims against the County."

Section 75 of chapter 18 defines the duties of the Auditor as follows:

"The Auditor shall issue warrants on the County Treasurer in favor of persons entitled thereto, in payment of claims and demands chargeable against the County, which have been legally examined, allowed and ordered paid by the Board of Supervisors. The Auditor shall also issue warrants on the County Treasurer for all debts and demands against the County when the amounts are fixed by law or authorized by law to be allowed by some person or tribunal other than the Board of Supervisors."

Section 76 of chapter 18 provides as follows:

"All warrants shall distinctly specify the liability for which they are drawn and when the same accrued."

Section 84 of chapter 18 provides as follows:

"The Auditor shall prepare and submit to the Board of Supervisors each year a statistical report of the County, exhibiting separately the receipts and expenditures by and on account of each office, board, commission and institution and classify the principal items of income and expenditure according to a plan to be approved by the Board of Supervisors, and the Board of Supervisors shall publish the same."

It will readily be seen from a reading of the above quoted sections contained in the County Act, that the Board of Supervisors of each County is restricted in its appropriations of funds to County purposes alone. If the appropriation is not for County purposes within the meaning of the sections above quoted, then the Board of Supervisors has absolutely no authority to make such appropriations. The powers and duties of the Board of Supervisors of this County are prescribed and laid down by the County Act, and if they go beyond the scope of the Act which gave them the power, then such act would be unwarranted and ultra vires. In other words, in order to properly ascertain the power of the Board of Supervisors with regard to the handling and disbursing of public moneys, a strict compliance with the letter of the law must be observed by the board, for it must be remembered that the Board of Supervisors is acting in a fiduciary capacity. That is to say, that the disposition of public funds is vested in the board for a limited period of time, and each and every Supervisor is held and should be held, according to law, to a strict accountability for these trust funds. And so, therefore, it is not a question as to what the Board of Supervisors desires to do, but rather, a question touching its powers.

In approaching this question, it becomes necessary to call the attention of your Honorable Board to the extent of power, limitations and canons of construction with regard to municipal corporations. I have heretofore quoted from Mr. Dillon in his work on Municipal Corporations, with reference to appropriations for the schools, but in order that the powers of the board may be readily seen, I therefore take the liberty of quoting again from Dillon on Municipal Corporations, as follows:

"It is a general and undisputed proposition of law that the municipal corporation possesses and can exercise the following powers and no others:

1. Those granted in express words;

2. Those necessarily or fairly implied in or incident to the powers expressly granted;

3. Those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation, the charter or statute by which it is